

No. 96-1971

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**

October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND  
G. MIRANNE and EDMOND G. MIRANNE, JR.,

versus

*Petitioners,*

REGIONS BANK OF LOUISIANA, WALTER L.  
BROWN, JR., PERRY S. BROWN and  
FOUNTAINBLEAU STORAGE ASSOCIATES,

*Respondents.*

On Petition For Writ Of Certiorari  
To The Fifth Circuit Court Of Appeals

**RESPONDENTS' BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Where a plaintiff files a state court action asserting a claim completely precluded by a prior federal court judgment on a matter of federal law, may the defendants properly remove the action to federal court pursuant to 28 U.S.C. § 1441(b)?

## LIST OF RELATED PARTIES

In accordance with Supreme Court Rule 29.6, respondents state as follows:

1. Regions Bank of Louisiana, respondent herein, is a fully-owned subsidiary of Regions Financial Corporation.
2. Fountainbleau Storage Associates, respondent herein, is a Louisiana limited liability company whose principals and related parties and entities include the following:
  - (a) Bayou Plaza Development, L.L.C.
  - (b) Storage Trust REIT
  - (c) Michael D. Aufrecht
  - (d) Burnam Storage Associates
  - (e) The Burnam Companies
  - (f) Roland von Kurnatowski
  - (g) Chris Burnam
  - (i) Tim Burnam

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**RESPONDENTS' BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

Respondents request that the Court deny the petition for writ of certiorari, which seeks review of a decision of the Fifth Circuit Court of Appeals. The Fifth Circuit's opinion is reported at 108 F.3d 576 (5th Cir. 1997) and is reprinted in the petition for certiorari at Appendix A.

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**STATEMENT OF THE CASE**

**I. Introduction**

The petitioners filed a state court action seeking to foreclose on a mortgage nearly a decade after the entry of a bankruptcy court order, from which no appeal ever has been taken, authorizing the sale of certain property "free and clear" of the same mortgage. Although the petitioners were aware of the bankruptcy sale when the state suit was filed, they artfully drafted the state court petition, deliberately refraining from notifying the state court of either the bankruptcy proceeding or the federal court's order. In response to petitioners' effort to relitigate in state court a matter already tried to and the subject of a final order of the bankruptcy court, the defendants in the state court suit removed the matter to federal district court under the authority of *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed 2d 103 (1981). Both the district court and the court of appeals held that removal was proper under *Moitie* and that the suit should be dismissed under principles of claim preclusion in light of the bankruptcy court order. The petition for certiorari

followed petitioners' unsuccessful attempt to secure an *en banc* hearing from the Court of Appeals.

## II. Statement of Facts

In 1957 Lois Stern leased to Pelican State Hotel Corp. a tract of property located in New Orleans, Louisiana. Pelican's interest in the lease ("Leasehold Estate")<sup>1</sup> was transferred on several occasions, finally being acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date THILP granted a mortgage ("First Mortgage") to secure a \$15,000,000 collateral mortgage note, which in turn had been pledged to secure a loan from First Financial Bank ("FFB").<sup>2</sup> Less than a year later, on May 2, 1984, THILP granted a second collateral mortgage ("Second Mortgage") on the Leasehold Estate to secure a \$5,000,000 collateral mortgage note<sup>3</sup> held by the petitioners, Edmond G. Miranne,

<sup>1</sup> As the Fifth Circuit noted, the term "leasehold estate" is foreign to a civil law jurisdiction such as Louisiana. Pet. at App. 3, n. 2. Nonetheless, this common law terminology provides a convenient way to refer to the rights created under the 1957 lease.

<sup>2</sup> A collateral mortgage package is a Louisiana device using a mortgage and the pledge of a mortgage note to secure another note or a line of credit. Its origins can be found in the Louisiana Civil Code. *First Guaranty Bank v. Alford*, 366 So.2d 1299 (La. 1978).

<sup>3</sup> A collateral mortgage note does not evidence the money that has been advanced by the lender; it is part of the security package. The Louisiana Supreme Court has held that the holder of a collateral mortgage note is not entitled to collect any funds from the borrower or from foreclosure on the mortgage unless there is money owing on the underlying debt. *First Guaranty*

Edmond G. Miranne, Jr., Mary Anna Rivet and Minna Ree Winer (collectively "the Mirannes").<sup>4</sup> Edmond G. Miranne, Jr. was a partner of THILP at all relevant times.

THILP filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 5, 1984. The THILP bankruptcy later was converted to a Chapter 7 proceeding, and a trustee was appointed. In the spring of 1986 the trustee applied for bankruptcy court authority to sell the Leasehold Estate free and clear of all liens, including the Second Mortgage. In response to the application, the bankruptcy court issued an order advising all creditors and parties in interest opposing the sale to serve objections on the trustee by June 12, 1986 and setting a hearing on the application for June 16, 1986.<sup>5</sup> At the hearing, which was held as scheduled "after all creditors and parties in interest [had] been given the required notice [and] opportunity to object . . .," Edmond G. Miranne, Jr. appeared as attorney for himself and his father. App. B at 4a.<sup>6</sup> A day later the bankruptcy court granted the sale

*Bank v. Alford*, 366 So.2d 1299 (La. 1978). See also Willenzik, "Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative," 55 La. L. Rev. 1 (1994); Nathan and Marshall, "The Collateral Mortgage, Logic and Experience," 49 La. L. Rev. 39 (1988).

<sup>4</sup> Mary Anna Rivet is married to Edward G. Miranne, and Minna Ree Winer is married to Edmond G. Miranne, Jr.

<sup>5</sup> A copy of this order is attached as Appendix A.

<sup>6</sup> A copy of the June 17, 1986 bankruptcy court order granting the trustee's sale application is attached as Appendix B.



application, stating expressly that the sale would be free and clear of the Second Mortgage. *Id.* at 4a, 9a.

Although the Mirannes argue now that the sale order was procedurally improper because it resulted from motion practice in the bankruptcy court, not from an adversary proceeding, Pet. 5, neither they nor any other interested party appealed from the sale order. On August 11, 1986, after expiration of the delays for appeal, the bankruptcy trustee held a public auction at which FFB, holder of the First Mortgage, submitted the only bid. The bankruptcy court approved the auction results and, by order dated August 14, 1986, directed that the sale proceed "free and clear of any and all liens and encumbrances" and that the Recorder of Mortgages for Orleans Parish "cancel and erase all liens, mortgages and encumbrances bearing against the said property . . . , including the Second Mortgage in favor of the Mirannes."<sup>7</sup> App. C at 18a, 19a, 23a.

Secor Bank eventually succeeded FFB as owner of the Leasehold Estate. On December 28, 1993 it acquired the underlying property from Walter L. Brown, Jr. and Perry S. Brown ("the Browns"), successors-in-interest to the original lessor, thereby extinguishing the lease as a matter of law. La. Civ. Code Ann. art. 1903. Later that day Secor

<sup>7</sup> A copy of the bankruptcy court's August 14, 1986 order is attached as Appendix C. For reasons that are unclear, the Recorder of Mortgages never has canceled the Second Mortgage. His failure to do so is of no import under Louisiana law, since recordation of an unenforceable mortgage does not give it any legal effect. *Gibraltar Sav. F.A. v. First Mort. Corp.*, 825 F.Supp. 746, 749 (M.D. La. 1993); *First Nat. Bank of Ruston v. Mercer*, 448 So.2d 1369, 1376 (La. App. 2d Cir. 1984).

conveyed the property in full ownership to Fountainbleau Storage Associates ("FSA"), its current owner. Secor since has been succeeded by Regions Bank of Louisiana ("Regions").

### III. The Proceedings Below

A year after FSA acquired the property, the Mirannes brought suit in Louisiana state court against FSA, Regions and the Browns, alleging that the December 1993 transactions, by cancelling the lease and conveying the property, had prejudiced their rights under the Second Mortgage. The Mirannes made no reference in their state court pleadings to the 1986 bankruptcy court orders that, on their face, provided that the Second Mortgage ceased to encumber the property after August 14, 1986.<sup>8</sup> Instead, treating the Second Mortgage as a currently valid encumbrance, they prayed for its recognition and enforcement against FSA's property or, alternatively, for damages.

The respondents removed the case to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1441(b), asserting that removal jurisdiction existed because of the claim preclusive effect of the bankruptcy court's orders. Following removal,

<sup>8</sup> In their petition the Mirannes assert, summarily and without citation to authority, that the bankruptcy court orders lapsed in 1996. Pet. 5, 9. Money judgments in Louisiana lapse after 10 years unless revived, but respondents are aware of no comparable provisions that might have a similar effect upon the bankruptcy court's orders, which are executory in nature. See La. Civ. Code Ann. art. 3501.



respondents sought summary judgment on the basis of, *inter alia*, claim preclusion, while the Mirannes moved that the case be remanded to state court for lack of subject matter jurisdiction. Relying primarily upon *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir. 1995), the district court denied the motion to remand, granted summary judgment in favor of FSA and Regions on the basis of claim preclusion, and granted summary judgment against the Browns on other grounds. Pet., App. B.

The Fifth Circuit affirmed. After reviewing briefly the doctrine of artful pleading, the court of appeals held that this Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), authorized removal on federal question grounds "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." Pet., App. 17 (quoting from *Carpenter*, 44 F.3d at 370). It then determined that the 1986 orders of the bankruptcy court precluded the Mirannes' lawsuit, which it characterized as a "transparent, 'second bite' collateral attack" on those orders, justifying both removal of the case and summary judgment dismissing it.<sup>9</sup> The Fifth

<sup>9</sup> Although it found *res judicata* inapplicable to the claims against the Browns, the Fifth Circuit held that it could exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367. It then affirmed the grant of summary judgment in favor of the Browns because of the Mirannes' failure to establish any legal basis or triable issue of fact to support a claim against them. Pet., App. 33-35.

Circuit rejected the Mirannes' request for *en banc* consideration. 114 F.3d 1185 (5th Cir. 1997). Their petition for writ of certiorari followed.

## REASONS TO DENY THE WRIT

### I. The Court Has No Reason to Revisit the *Moitie* Footnote, Which Has Been the Subject of Relatively Little Circuit Court Jurisprudence and Which Has Generated No Significant Circuit Conflict

Both the district court and Fifth Circuit upheld removal jurisdiction in the instant case based upon footnote 2 of *Moitie*, which the court of appeals interpreted as authorizing removal on artful pleading grounds when a plaintiff files a state court action already barred by a federal judgment on a question of federal law. Pet., App. 17. The Mirannes' petition requests that the Court grant certiorari "to re-address the *Moitie* footnote . . ." Pet 23. Although the arguments that it presents in support of that request are diffuse at best, the Mirannes appear to rely primarily upon a perceived inconsistency between the specialized artful pleading rule established by *Moitie* in the claim preclusion context and three subsequent decisions explicating the law of removal jurisdiction in other legal and factual contexts, *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 2d 420 (1983), *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), and *Oklahoma Tax Comm. v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989).

The circuit courts have perceived no such inconsistency and have had relatively little difficulty interpreting *Moitie* in the small number of cases affected by the jurisdictional rule of that case. Moreover, the circuit court decisions in those cases are not in substantial conflict. Thus, the instant case presents no compelling reasons for review and, more particularly, implicates none of the considerations governing review on certiorari expressly listed in Supreme Court Rule 10.

While urging this Court to re-address *Moitie*, the petitioners never address its facts or holding, preferring instead a critique with no context. Viewed in context, *Moitie* is not the aberration petitioners posit, but a narrow extension of the artful pleading doctrine designed to prevent sequential litigation dressed in "intentionally deceitful garb," in the Fifth Circuit's phrase. Pet., App. 34. To demonstrate how this is so, a brief review of *Moitie's* facts and holding are necessary.

*Moitie*, like the instant case, involved an attempt by an unsuccessful litigant in federal court to refile his case in state court using pleadings containing no reference to the adverse federal judgment. Seven plaintiffs filed and lost an antitrust suit in federal court. Five of the seven appealed and ultimately were successful in that effort because of a new decision by this Court that worked a substantial change in the applicable law. The other two, *Moitie* and *Brown*, chose instead to refile their cases in state court, ostensibly pleading only state causes of action. Defendants removed the new cases to federal district court, which denied the motions to remand filed by *Moitie* and *Brown* upon finding that their state court complaints raised "essentially federal law claims" that

had been artfully recast as state law claims. 452 U.S. at 396-97, 101 S.Ct. at 2427. The district court then dismissed the removed actions as *res judicata* in light of the judgment entered in the prior federal litigation. *Id.*

*Moitie* and *Brown* appealed to the Ninth Circuit, which affirmed the district court's assertion of removal jurisdiction, but reversed on the merits of the *res judicata* determination. This Court granted certiorari "to consider the validity of the Court of Appeals' novel exception to the doctrine of *res judicata*," 452 U.S. at 398, 101 S.Ct. at 2427, ultimately finding the exception to be invalid. To reach that issue, however, the Court first had to determine its jurisdiction to do so, which it did in a footnote.

The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficiently federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the



Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state law claims. We will not question here that factual finding.

452 U.S. at 396-97 n. 2, 101 S.Ct. at 2427 n. 2.

Because the footnote addresses such a narrow jurisdictional issue, the circuit courts have had relatively few occasions to consider its import. The decisions that are extant reflect two somewhat different approaches to interpretation of the *Moitie* footnote, with one approach ultimately becoming generally accepted. The Second Circuit, in a relatively early decision, *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760-61 (2d Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), formulated what has been termed an "election of remedies" approach. Under this approach, if plaintiff files a complaint based on federal law in federal court and subsequently files another action in state court, purportedly based only on state law, but with virtually identical elements to the federal claims, he renders the second suit removable because he already has chosen, by his first suit, to pursue his federal claims. The Ninth Circuit, concerned that *Sarkisian's* rationale was overbroad, viewed the *Moitie* footnote more narrowly, reasoning, in light of the facts of *Moitie*, that the Court had intended to permit removal only of state court claims barred by the *res judicata* effect of a prior federal judgment. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374-75 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987).

*Sullivan* has been followed in a series of Ninth Circuit decisions. See, e.g., *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990) (limiting *Sullivan* to situations in which prior federal judgment resolved issues of federal law); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir. 1988). Both the Sixth and Seventh Circuits likewise have found *Moitie* to support removal in the *res judicata* context. See *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342 (6th Cir. 1989). More recently the Fifth Circuit adopted the rationale of *Sullivan* in *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362, 369 n. 6 (5th Cir. 1995), holding "that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a matter of federal law." *Id.* at 370.

In light of this emerging circuit court consensus on the import of *Moitie*, less than unanimous only because of the Second Circuit's *Sarkisian* opinion, the Fifth Circuit's decision in the instant case was entirely predictable. Even Judge Jones, who dissented below, agreed with the majority's "well grounded" understanding of *Moitie*, although she disagreed with its application to the particular facts before her. Pet., App. 38-39. That disagreement over the proper application of *Moitie* does not warrant review by this Court, for as Supreme Court Rule 10 states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."



*Moitie* created a narrow addition to the artful pleading doctrine applicable when a federal judgment on a matter of federal law precludes a subsequent state court lawsuit. The circuit courts have had little difficulty interpreting *Moitie* in a consistent, rational manner such that it can coexist peacefully with the principles enunciated in *Franchise Tax Board*, *Caterpillar* and *Oklahoma Tax Commission*, none of which involved issues of claim preclusion. It hardly is a wise use of this Court's limited resources to review a doctrine that has affected few litigants and has generated little controversy in the lower courts.

## II. The Determination of Subject Matter Jurisdiction Often Requires Consideration of the Merits

Petitioners posit that the Fifth Circuit's jurisdictional holding in the instant case creates a logical conundrum by requiring a federal court to review an aspect of the merits of a removed case, namely whether it is barred by *res judicata*, to determine if it has subject matter jurisdiction in the first place. Pet. at 18-20. In creating this straw man, petitioners wrongly suggest that jurisdictional determinations in all other types of cases can be separated clearly from consideration of the merits.

This Court's jurisprudence is replete with counterexamples. Perhaps the most analogous of those counterexamples comes from two of the very cases that petitioners assert to be in conflict with the decision below, *Franchise Tax Board* and *Caterpillar*. In *Franchise Tax Board* the Court considered removal jurisdiction in the context of state law claims that defendant argued had been preempted by ERISA. Citing *Avco Corp. v. Aero Lodge No. 735, Intern.*

*Assn. of Machinists and Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), the Court held "that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board*, 463 U.S. at 24, 103 S.Ct. at 2854. In ruling that the case before it did not arise under ERISA and hence had been removed improvidently, the Court has to consider one important aspect of the case's merits – whether ERISA preempted the state law claims found in the complaint – an issue it ultimately decided favorably to the plaintiff. *Id.*, 463 U.S. at 24-27, 103 S.Ct. at 2854-55. Indeed, in any case involving the "complete preemption corollary to the well pleaded complaint rule," *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430, the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction. See, e.g., *id.*, 482 U.S. at 394-96, 107 S.Ct. at 2430-31; *Avco*, 390 U.S. at 559-60, 88 S.Ct. at 1235 (determining first that plaintiff's state law claims were preempted and concluding from this that the district court had jurisdiction over the case); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (court had to conclude that allegations of complaint fell under ERISA to determine propriety of removal.)

Similar examples abound outside the context of the artful pleading doctrine. Where a removing defendant alleges that the plaintiff has fraudulently joined a non-diverse defendant to prevent removal, a federal court can look beyond the complaint to the merits of the claim against that defendant to determine whether jurisdiction exists.

If . . . a non-resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions.

*Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 37, 66 L.Ed. 144 (1921); see also *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996) (court should employ a summary judgment-like procedure to resolve fraudulent joinder contentions); *Faucett v. Ingersoll-Rand Min. & Machinery Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (fraudulent joinder established by affidavit absolving non-diverse defendant of liability). Courts likewise must consider the merits of a plaintiff's complaint to determine whether the amount in controversy meets jurisdictional requirements. E.g., *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 729, 83 L.Ed. 1111 (1939) ("If there were any doubt of the good faith of the allegations [of amount in controversy], the court might have called for their justification by evidence"); *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 184, 56 S.Ct. 780, 783, 80 L.Ed. 1135 (1936). Subject matter jurisdiction and merits issues also can overlap substantially in cases involving sovereign immunity, *Land v. Dollar*, 330 U.S. 731, 739, 67 S.Ct. 1009, 1013, 91 L.Ed. 1209 (1947) ("the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits"), and the "in commerce" jurisdictional requirement of the antitrust laws. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 201 n. 19, 95 S.Ct. 392, 402 n. 19, 42 L.Ed.2d 378 (1974) (noting identity of jurisdictional issues

and certain issues on the merits); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-34 (9th Cir. 1979) ("if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits").

*Moitie's* narrow and limited scope requires far less intrusive "merits" review than is mandated when, for example, a claim of fraudulent joinder is raised in a diversity action. In the latter, evidence in the form of affidavits (dealing with the fraudulently joined party's job, scope of responsibility, or activities) often must be presented to the court to be considered in ruling on the issue; in *Moitie*, as here, the only "evidence" to be considered are prior court orders and pleadings. The Fifth Circuit's opinion is not, as the petitioners claim, an aberration; rather, it is merely the latest in a long line of similar decisions, many of them from this Court, recognizing that in certain limited circumstances jurisdiction and "merits" issues are intertwined and must be considered together. The fact that a mixed question of jurisdiction and merits occurs in this limited context should not constitute a basis for this Court to exercise its discretionary jurisdiction.

### III. The Decision of the Fifth Circuit Does Not Alter the Balance Between the Federal and State Judicial Systems

Removal of a state court action precluded by a prior federal judgment is not the only means by which a defendant can avoid relitigation of the precluded claims. Under the relitigation exception to the Anti-Injunction Act, the



federal courts may enjoin state court proceedings to protect prior federal judgments. 28 U.S.C. § 2283. For that reason the *Moitie* doctrine, as explicated by the circuit courts, does not alter the existing balance between the federal and state judicial systems.

There is little practical distinction between, on the one hand, removing and dismissing a precluded state court suit and, on the other hand, enjoining one . . . Instead of removing, the defendants in *Moitie* might . . . have requested an injunction from the federal court. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). If issued, an injunction would have had the same effect as removal: the end of state-court proceedings. Because the relitigation exception to the Anti-Injunction Act has already realigned federal-state relations in favor of the federal courts in such an instance, any potential impact on federalism from removal was not significant.

*Carpenter*, 44 F.3d at 370.

To be sure, there are some differences between *Moitie* removal and the relitigation exception to the Anti-Injunction Act. For one, an injunction can be issued only if the claims in the state proceedings actually were decided by the federal court. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S.Ct. 1684, 1690-91, 100 L.Ed.2d 127 (1988). *Moitie* imports no such "actually litigated" standard into the law of removal jurisdiction. Pet., App. 28. In addition, a federal court is not required to enjoin a precluded state court proceeding, but merely has the discretion to do so. *Id.*, 486 U.S. at 151, 108 S.Ct. at 1692. The federal court cannot refuse to entertain a removed case properly before it under *Moitie*.

These distinctions, however, are of no moment in the instant case. In responding to one of petitioners' arguments concerning the propriety of removal, both the district court and the Fifth Circuit found that the issues raised in petitioners' state court pleadings already had been litigated before the bankruptcy court and decided adversely to them, satisfying the *Chick Kam Choo* prerequisite for issuance of an injunction. Pet., App. 27-30, 50. Moreover, there can be little doubt from the tenor of the Fifth Circuit's opinion that had the respondents requested an injunction under 28 U.S.C. § 2283, the lower court would have exercised its discretion to grant one. Pet., App. 34 (characterizing state court complaint as a "blatant attempt at a 'gotcha'" and criticizing its "intentionally deceitful garb"). Thus, the removal of petitioners' state court action accomplished nothing beyond what the relitigation exception to the Anti-Injunction Act authorizes.

In light of the availability of injunctive relief in most instances of *Moitie* removal, including this one, petitioners' assertion that the Fifth Circuit's decision "removes virtually any limitation to the naked assertion of federal power over a state court" is best viewed as the hyperbole of a litigant desperate to salvage a precluded claim that never should have been brought. Even should the Court believe that it needs someday to revisit the *Moitie* footnote, which seems unnecessary giving the growing circuit court consensus on its import, this case is not the proper vehicle to do so. Petitioners' substantive claim, that they should be allowed to foreclose on a mortgage that the bankruptcy court ordered removed a decade earlier, is frivolous. This Court ought not squander its resources to review a jurisdictional issue that is without practical significance.

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### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA  
 IN THE MATTER OF: NO. 84-02145-K  
 TULANE HOTEL INVESTORS  
 LIMITED PARTNERSHIP CHAPTER 7  
 DEBTOR (Filed  
 August 15, 1986)

### ORDER

Considering the foregoing application by the Trustee for approval of employment of auctioneer, approval of sale by public auction, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approval of letter agreement by and between the Trustee and First Financial Bank, F.S.B., it is:

HEREBY ORDERED BY THIS HONORABLE COURT that creditors and parties in interest of this estate are given until the 12 day of June, 1986, to service any objection to the sale on the Trustee, and to file such objection with the Clerk of the U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if objections are received, a hearing will be held before the undersigned bankruptcy judge on the 16th day of June, 1986, at 9:00 o'clock A.m., in Room 1-104, U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if no objections are received this Honorable

Court hereby authorizes the employment of Marvin Kessler of Lemarco and Associates as auctioneer at a fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00; that this Honorable Court authorizes the sale by public auction as set forth in said application, on the 31 day of July, 1986, at 10:30 o'clock A.m., at 4040 Tulane Ave, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approves the letter agreement by and between the Trustee and First Financial Bank, F.S.B.

New Orleans, Louisiana, this 18th day of April, 1986.

/s/ T. H. Kingsmill  
T. H. KINGSMILL, JR.  
 U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
 EASTERN DISTRICT OF LOUISIANA

IN RE:	CASE NO. 84-02145K
TULANE HOTEL INVESTORS	CHAPTER 11
LIMITED PARTNERSHIP	CONVERTED TO
DEBTOR	CHAPTER 7
	(Filed Jun. 19, 1986)

ORDER AUTHORIZING EMPLOYMENT  
OF AUCTIONEER AND SALE BY PUBLIC AUCTION  
OF PROPERTY FREE AND CLEAR OF ANY  
AND ALL INTERESTS, CLAIMS, LIENS,  
MORTGAGES AND ENCUMBRANCES

On the 16th day of June, 1986, came on for hearing the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances.

APPEARANCES:

Emile L. Turner, Jr.	- attorney for Jean Hebert Turner, Trustee (hereinafter "the Trustee")
J. Michael Dendy	- Attorney for Walter Brown
Edmond G. Miranne, Jr.	- Attorney for Edmond. G. Miranne, Jr. and Edmond G. Miranne, Sr.
Lee C. Grevemberg	- Attorney for Tulane Hotel Investors Corporation, Tulane Hotel Investors

Limited Partnership,  
Barry Trinchard, and Nor-  
man Parent

Alwynn J. Cronvich - Attorney for McCann  
Electronics

It appearing that all creditors and parties in interest have been given the required notice, opportunity to object and be heard; further that this Court has determined that the sale is in the best interest of the estate and the public auction represents the best method of obtaining the best possible price under the circumstances of the property being sold, therefore:

IT IS HEREBY ORDERED that:

- 1) The Trustee is authorized to sell at public auction the property known as the Bayou Plaza Hotel, as more particularly described in Exhibits "A" and "B" attached hereto, less and except the property described in Exhibit "C" attached hereto;
- 2) The sale will be free and clear of any and all interests, claims, liens, mortgages and encumbrances including without limitation those items detailed on Exhibit "D" attached hereto (with exception made for those certain chattel mortgages as shown on Exhibit "C");
- 3) The Trustee is authorized to employ Marvin Kessler of Lemarco and Associates as auctioneer at the public auction sale, said auctioneer to receive \$3,000.00 as compensation for services rendered plus the reimbursement of expenses not to exceed \$5,000.00, which amounts shall be paid by the Bank after completion of the public auction sale;

- 4) The terms of the sale by public auction shall be (a) minimum opening bid of \$5,250,000.00, which sum equals seventy-five (75%) percent of the appraised value of the property as found by the Court in its Judgment signed June 9, 1986; (b) the minimum opening bid shall be guaranteed by the Bank upon the terms and conditions as set forth in the letter agreement as shown in Exhibit "E" attached hereto, which terms and conditions are approved by the Court; (c) the Bank's minimum bid may be as a credit against the secured indebtedness in favor of the Bank; and (d) all bids other than that of the Bank shall be cash payable by ten (10%) percent non-refundable deposit at time of auction and balance payable not later than thirty (30) days from auction date.
- 5) In the event that the minimum bid by the Bank is exceeded, then the Trustee is authorized to distribute the sale proceeds first retaining the net amount of \$150,000.00 for the estate; secondly, the balance of the proceeds shall be paid to the Bank in whole or partial payment of its secured claim;
- 6) Upon completion of the sale to the successful bidder, and receipt of the purchase price, Trustee is authorized and directed to execute and deliver a deed conveying unto the successful bidder the property as outlined in Paragraphs (1) and (2) *supra* and any and all other documents necessary to comply with the terms and conditions of the letter agreement attached as Exhibit "E";
- 7) Upon certification by the Trustee that the sale by public auction and conveyance to the successful bidder is complete, the Recorder of Mortgages for the Parish of Orleans, State of Louisiana, is hereby authorized and directed to cancel and



erase from the public records of his office all liens, mortgages and encumbrances, but only insofar as they may affect the property described in Exhibits "A" and "B" attached hereto, including without limitation, those liens, mortgages and encumbrances as shown on Exhibit "D" attached hereto except for those certain chattel mortgages as shown on Exhibit "C" attached hereto.

SO ORDERED, this 17th day of June, 1986, at New Orleans, Louisiana.

/s/ T.H. Kingsmill, Jr.  
U. S. BANKRUPTCY JUDGE

#### EXHIBIT D

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Liens Acct. #085164, Fountainbleau Hotel, a Louisiana corp., due \$43,734.82, dated August 8, 1974, filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;
- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$ \_\_\_\_\_, recorded at MOB 2369, Folio 314 on May 4, 1981;
- 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;

- 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
- 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
- 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
- 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
- 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;
- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership,

- in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
  - 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
  - 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;
  - 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
  - 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
  - 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
  - 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
  - 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
  - 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
  - 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;

- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;
- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85 at MOB 2470, Folio 109 on September 13, 1984;



- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;
- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;
- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;

- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Edmond G. Miranne, Sr., guarantor of the loan by First Financial Bank to Tulane Hotel Investors Limited Partnership, and claimant in the following proceedings:
  - a) "First Financial Bank versus Virginia Copeland, wife of/and Edward F. Butler". Case Number 303-674 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
  - b) "First Financial Bank versus Wendy Early, wife of/and Norman A. Parent", Case Number 303-675 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
  - c) "First Financial Bank versus Barry Trinchard", Case Number 303-676 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
  - d) "Tulane Hotel Investors Corporation, et al vs. First Financial Bank, F.S.B. et al", Case Number 84-6127 of the Docket of the United States District Court for the Eastern District of Louisiana;
  - e) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, F.S.B.", Case Number



85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;

- f) "First Financial Bank, F.S.B. vs. Tulane Hotel Investors Limited Partnership", Case No. 85-8279 of the Docket of the Civil District Court for the Parish of Orleans, State of Louisiana;
- 49) Mary Anna Rivet/wife of Edmond G. Miranne, Sr., and claimant in proceedings enumerated in Section 50, *supra*;
- 50) Edmond G. Miranne, Jr., limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 51) Minna Ree Weiner/wife of Edmond G. Miranne, Jr., and claimant in proceedings enumerated in Section 50, *supra*;
- 52) Barry Trinchard, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 53) Norman A. Parent, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 54) Wendy Early/wife of Norman A. Parent, and claimant in proceedings enumerated in Section 50, *supra*;
- 55) Tulane Hotel Investors Corporation, corporate general partner of Tulane Hotel Investors Limited Partnership and claimant in proceedings enumerated in Section 50, *supra*;
- 56) Edward F. Butler, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 57) Virginia Copeland/wife of and Edward F. Butler and claimant in proceedings enumerated in Section 50, *supra*;

- 58) Riverbank Mortgage Company, whatever interest may exist as a mortgage broker;
  - 59) Sue Brignac, whatever interest she may have as a party in interest.
  - 60) Notice of Lis Pendens by Edmond G. Miranne, Jr., in regard to the following proceedings:
    - a) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB, et al, bearing docket number 84-6127 of the United States District Court for the Eastern District of Louisiana;
    - b) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB", bearing docket number 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;
    - c) "First Financial Bank, FSB vs. Tulane Hotel Investors Limited Partnership", bearing docket number 85-8279 of the Civil District Court for the Parish of Orleans, State of Louisiana;
    - d) "First Financial Bank, FSB vs. Virginia Copeland, wife of, and Edward F. Butler", bearing docket number 303-674 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
    - e) "First Financial Bank, FSB vs. Wendy Early, wife of, and Norman A. Parent", bearing docket number 303-675 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
    - f) "First Financial Bank, FSB vs. Barry Trinchard", bearing docket number 303-676 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.
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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF:	*	
TULANE HOTEL	*	NO. 84-02145-K
INVESTORS LIMITED	*	IN BANKRUPTCY
PARTNERSHIP	*	
DEBTOR	*	
*****		

ORDER

Considering the foregoing Application of the Trustee herein, it is:

—HEREBY ORDERED that the public auction sale held in the above captioned matter on Monday, August 11, 1986, at 2:00 p.m. in the Etouffe Dining Room, First Floor Bayou Plaza Hotel, 4040 Tulane Avenue, New Orleans, Louisiana, of the following:

A. All of the Debtor's Leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between Mrs. Lois Stern, wife of Walter Brown (and the said Walter Brown by intervention), as lessor and Pelican State Hotels Corporation, as lessee, dated October 4, 1957 and duly registered in COB 622, folio 126 on November 5, 1957, as amended May 22, 1958 and duly registered in COB 621, folio 595 on June 6, 1958; all of the right, title and interest of Pelican State Hotels Corporation was acquired by H. R. Weissberg Corporation by Agreement of Merger dated December 19, 1961 and duly registered in COB 644, folio 287, on

March 20, 1962; and all of the right, title and interest of Pennsylvania Real Estate Investment Trust was acquired by act under private signature, dated April 23, 1965, and duly registered in COB 668B, folio 254 on April 26, 1965. Fontainebleau-Orleans acquired said interest by act before Louis G. Dutel, Jr., N.P., dated December 30, 1975, COB 738A, folio 406.

B. All of the interest of the estate in and to the buildings and improvements located and/or situated on the following described property bearing municipal number 4000 Tulane Avenue, City of New Orleans, State of Louisiana, together with all the rights, ways, privileges, servitudes and appurtenances thereunto belonging or in anywise appertaining, situated on the leasehold hereinabove described and consisting more particularly of the following described property:

THAT CERTAIN PORTION OF GROUND, together with all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the First District of the City of New Orleans, designated as SQUARE NO. 763, bounded by Tulane and Carrollton Avenues and Gravier and South Pierce Streets, and according to a survey made by F. C. Gandolfo, Jr., Surveyor, dated July 7, 1937, a blue print copy of which is annexed to an Act before Robert Legier, Notary Public, on March 21, 1941, which survey was redated December 16, 1947, a blue print copy of which survey was annexed to an Act before Ernest Carrere, Jr., Notary Public, on December 22, 1947, said square measures 425 feet, 7 inches, 2 lines, actual, 424 feet, 2 inches, 6 lines, title, front on Carrollton Avenue, 425 feet, 9 inches,



no lines actual, 425 feet, 6 inches, 2 lines title, front on South Pierce Street, 604 feet, 3 inches, 5 lines actual, 602 feet, 11 inches, 2 lines title, front on Tulane Avenue, and 642 feet, 1 inch, 3 lines actual, 642 feet, 3 inches, no lines title, front on Gravier Street.

C. All of the estate's right, title and interest in and to that certain machinery, equipment, furniture, fixtures and/or all other property, of every nature and kind whatsoever, that has been placed in, upon or above the property hereinabove described for the service and operation of the buildings and improvements thereon or which is located thereon for the use of the Debtor, either directly or indirectly in such service or operation (less and except that property subject to the exception noted on Exhibit "B");

D. All of the estate's right, title and interest in and to those existing leases and/or subleases granted by Pelican State Hotels Corporation, H. R. Weissberg Corporation, "The Fontainebleau Motor Hotel", Pennsylvania Real Estate Investment Trust, Fontainebleau Hotel Corporation, and/or the Debtor as Lessor(s), to any present tenants, occupants, licensees, franchise and/or concession holders;

E. All of the Debtor's leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between the City of New Orleans, Louisiana, as lessor, and Fontainebleau-Orleans, an Ordinary Partnership in Commendam, as lessee, said lease being authorized by ordinance Number 6134 dated September 30, 1976 and approved by the City Council on October 21, 1976, and the Mayor of the City

of New Orleans, Louisiana on October 22, 1976, and duly recorded in COB 743E, folio 118-124 of the conveyance records for the Parish of Orleans, on December 20, 1976.

Together with all buildings and improvements, appurtenances and attachments, rights, ways, privileges, servitudes, advantages, batture and batture rights, thereunto belonging or in anywise appertaining, including all immovables by nature or destination, and their component parts, now or hereafter forming part of and attached to or connected with said property or used in connection therewith.

F. All corporeal movables owned by the Debtor that are now and from time to time shall be located upon the above described premises for use in the conduct and/or operation of the hereinabove business and commercial activity, namely the hotel/motel now known as the Bayou Plaza Hotel including without limitation all equipment, furniture, television sets (less and except the television sets described in Section C hereof), fixtures of every kind and description, without exception that are now or may come upon the premises; and

G. All right, title and interest in and to that certain mass or assemblage of food and restaurant supplies, including canned and frozen foods, beer, wine and other alcohol beverages and soft drinks, constituting the entire stock of supplies and inventory of the Debtor now located and to be located at its place of business known as the Bayou Plaza Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana 70119.

H. Less and except (a) certain television equipment; (b) certain private cable equipment leased



from McCann Electronics; (c) certain equipment leased from First Continental Leasing Corporation; (d) certain laundry equipment; (e) certain refrigeration equipment.

1. Equipment for private cable system owned and leased by Malcolm G. McCann, Jr., McCann Electronics, as described in the inventory.
2. Equipment owned and leased by First Continental Leasing Corporation as described in the three leases.
3. Television equipment and accessories subject to the vendor's lien of George H. Lehleitner & Co., Inc. as described in the inventory.
4. Laundry equipment subject to the chattel mortgage in favor of United Machinery Corporation recorded at MOB 2438, folio 365, on January 24, 1984.
5. Refrigeration equipment subject to the chattel mortgages in favor of Warren Refrigeration Company recorded at MOB 2438, folio 550, on January 13, 1984; MOB 2456, folio 43, on May 7, 1984; and MOB 2459, folio 12, on May 21, 1984, as described in the inventory.

to First Financial Bank, F.S.B., for the total price and sum of \$5,250,000.00, all cash, free and clear of any and all liens and encumbrances except:

Chattel mortgage by Tulane Hotel Investors Limited Partnership in favor of United Machinery Corporation in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on January 13, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984.

be and the same is hereby approved.

IT IS FURTHER ORDERED, that the First Financial Bank, F.S.B., be and it is hereby ordered to pay to Marvin Kessler of Lemarco Associates, Inc., Auctioneer, fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00.

IT IS FURTHER ORDERED, that First Financial Bank, F.S.B., pay to the Trustee herein the sum of \$150,000.00 as previously agreed.

IT IS FURTHER ORDERED, that the Recorder of Mortgages for the Parish of Orleans cancel and erase all liens, mortgages and encumbrances bearing against the said property, to-wit:

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Lien, Acct. #085164, Fountainbleau Hotel, a Louisiana Corp., due \$43,734.82, dated August 8, 1974,

- filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;
- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$ \_\_\_\_\_, recorded at MOB 2369, Folio 314 on May 4, 1981;
  - 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;
  - 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
  - 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
  - 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
  - 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
  - 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;

- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
- 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
- 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;

- 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
- 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
- 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
- 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
- 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
- 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
- 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;
- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;

- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85, at MOB 2470, Folio 109 on September 13, 1984;
- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;



- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;

- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;
- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Notice of Lis Pendens by Edmond G. Miranna, Jr., filed in MOB 2525, folio 360.

IT IS FURTHER ORDERED, that Jean Hebert Turner, Trustee herein, be and she is hereby authorized to execute any and all documents necessary to effectuate the transfer of the hereinabove described property to First Financial Bank, F.S.B., the successful bidder.

New Orleans, Louisiana, this 14th day of August, 1986.

/s/ T. H. Kingsmill, Jr.  
 T. H. KINGSMILL, JR.  
 UNITED STATES  
 BANKRUPTCY JUDGE

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